

FILED

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

2013 FEB 25 P 12:05

CLERK US DISTRICT COURT  
ALEXANDRIA, VIRGINIA

DAVID PARDO,  
4854 Eisenhower Avenue, #447  
Alexandria, VA 22304

Plaintiff

v.

FEDERAL AVIATION  
ADMINISTRATION,  
800 Independence Avenue SW  
Washington, D.C. 20591

Defendant

Civil Action # 1:13-cv-14

FIRST AMENDED COMPLAINT

**PRELIMINARY STATEMENTS**

1. This action is brought under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, *et seq.*, as amended, in order to compel the Federal Aviation Administration ("FAA" or "the Agency") to disclose records wrongfully withheld in failing to respond within the statutory deadline to Plaintiff's FOIA request and exempting responsive information without justification.
2. FOIA requires that federal agencies respond to public requests for records, including files maintained electronically, in order to increase public understanding of the workings of government and for access to government information.
3. Plaintiff David Pardo is an attorney who was employed by the FAA until he was terminated after disclosing wrongdoing by FAA officials.

4. Plaintiff's FOIA request, submitted on July 27, 2012, seeks records primarily related to an assignment that is believed to have been manipulated by FAA officials in the Office of Chief Counsel ("AGC") and Flight Standards Service ("AFS") to create a pretext for Plaintiff's termination.
5. This request serves to help the public because the records sought detail collusive practices by FAA officials to retaliate against a whistleblower, corrupt the legal process, and subvert the rule of law, all to the public's detriment.
6. FAA's conduct is arbitrary and capricious and amounts to a denial of Plaintiff's FOIA request. FAA's conduct frustrates Plaintiff's efforts to vindicate his legal rights and educate the public regarding FAA's treatment of employees concerned with redressing improprieties in government.
7. Plaintiff constructively exhausted his administrative remedies under FOIA, 5 U.S.C. § 552(a)(6)(C), and seeks a court order requiring FAA to immediately produce the records sought in his FOIA request as well as other appropriate relief.

#### **JURISDICTION AND VENUE**

8. This Court has jurisdiction over this action under FOIA, 5 U.S.C. § 552(a)(4)(B). This Court also has federal question jurisdiction over this action under 28 U.S.C. § 1331.
9. This Court has the authority to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*
10. This Court is a proper venue because Plaintiff resides in this district. 28 U.S.C. § 1391(e)(1)(C) (where defendant is the government or a government agent, a civil action may be brought in the district where the plaintiff resides if there is no real property at issue). Venue is also proper under 5 U.S.C. § 552(a)(4)(B).

11. This Court has the authority to award costs and attorneys' fees under 28 U.S.C. § 2414 and 5 U.S.C. § 552(a)(4)(E).

### **PARTIES**

12. Plaintiff David Pardo is a natural person residing in Alexandria, Virginia.
13. Since Plaintiff's termination from the FAA, in September 2010, he has been active in raising awareness about retaliation against whistleblowers, especially federal whistleblowers. Plaintiff currently engages in advocacy, research, education, and outreach regarding whistleblower issues via his website, [www.mspbwatch.net](http://www.mspbwatch.net), which draws about 2,000 unique visitors per month.
14. Defendant FAA is an agency of the United States as defined by 5 U.S.C. § 552(f)(1). FAA is charged with the duty to provide public access to records in its possession consistent with the requirements of the FOIA. Here, FAA is denying Plaintiff access to its records in contravention of federal law

### **FACTS**

15. Plaintiff's FOIA request was submitted to the Agency on July 27, 2012 (request number 2012-6972).
16. Plaintiff's request sought, in relevant part,

[A]ll documents pertaining to a May 14, 2010 Request for Interpretation from Mr. Keith Stamper of COMAIR Inc. ["Stamper Request"]. Documents, including emails, should be in the possession of individuals within AGC and AFS that include Dale E. Roberts, AFS-220, Richard Clarke, AFS-200, Anne Bechdolt, AGC-220, and Jodi L. Baker, AFS-200, though there may be others. Please limit the search to June 10, 2010 to July 14, 2010.

I also request the attachment to an email sent by Yvette Armstead, AGC-30, to Cynthia Wheeler, Quentin Barrett, and Scott Cooper on September 16, 2010 at 8:52am. The subject line is 'probationary template.'

17. On August 17, Plaintiff received from Leslie H. Smith, Manager, Air Transportation Division ("ATD"), AFS, a fee estimate of \$200 for 2 hours of free search and 4 hours of additional searching, at \$50 per hour. Plaintiff agreed to pay this amount.

18. On August 27, Plaintiff received a response from Rebecca MacPherson, Assistant Chief Counsel for International, Legislation, and Regulations, Office of Chief Counsel, for documents in its possession that were responsive to Plaintiff's request.

19. Ms. MacPherson's response noted that

Enclosed are copies of all documents relevant to your request. Your request was also forwarded to two other FAA offices to search for information on items one and two [the items listed above]. They will respond to you directly.

20. AGC's FOIA documents contained several emails sent to or from individuals assigned to AFS, such as the employees named in Plaintiff's request. In addition, documents in Plaintiff's possession from an earlier FOIA request were generated by, or sent to, named AFS employees and pertained to the Stamper Request.

21. On August 31, Plaintiff received another fee estimate from Mr. Smith for an additional hour of search, at \$50, because AFS exhausted the six search hours agreed to. Plaintiff agreed to pay this amount as well.

22. On October 10, Plaintiff received from John M. Allen, Director, AFS, an initial determination of his request with one enclosed document. Mr. Allen's response noted that

A records search was conducted in the Air Transportation Division's computer database systems. We were able to locate a correspondence letter between the Office of Chief Counsel and Mr. Keith Stamper dated September 13, 2010.<sup>1</sup> This letter is in response to Mr. Stamper's request

---

<sup>1</sup> The September 13, 2010 letter is an Interpretation Letter by the Office of Chief Counsel that was coordinated with AFS. It is available to the public through an AGC database, at [http://www.faa.gov/about/office\\_org/headquarters\\_offices/agc/pol\\_adjudication/agc200/interpretations/data/interps/2010/Stamper.pdf](http://www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/agc200/interpretations/data/interps/2010/Stamper.pdf).

**for a legal interpretation of '24 consecutive hours' as used in the rest provisions of Title 14 Code of Federal Regulations section 121.471(d). We were unable to locate any email records from Richard Clarke, Jodi Baker, and Dale Roberts from June 10, 2012 [sic] to July 14, 2010. [Emphasis added.]**

23. On October 21, Plaintiff filed an appeal of the FAA's initial determination with the Assistant Administrator for Finance and Management, pursuant to 49 C.F.R. § 7.21(c), questioning the adequacy of the FAA's search.
24. On or after October 26, Plaintiff received through the U.S Postal Service a certified mail receipt dated October 26 corresponding to his October 21 appeal.
25. On November 30, Plaintiff e-mailed the FAA's known e-mail address associated with its FOIA office, [7-awa-arc-foia@faa.gov](mailto:7-awa-arc-foia@faa.gov), to inquire about the status of his appeal.
26. On December 31, Plaintiff once again e-mailed the FAA's known FOIA address, as well as Mr. Smith, to inquire about the status of his appeal.
27. Until the date of his complaint, Plaintiff had not received a determination of his October 21 appeal. Defendant had not contacted Plaintiff to address Request No. 2012-6972, or any of his requests for status updates, since sending its initial determination of October 10. Nor had Defendant given any indication that production was imminent or that it was engaged in a rolling production schedule.
28. Plaintiff has afforded FAA ample time beyond that which is legally required to respond to his request and appeal. Plaintiff has reason to believe that at least some of the records requested are readily available from AFS.
29. More than 150 days have passed since Plaintiff submitted Request No. 2012-6972 to FAA. More than 60 days have passed since Plaintiff submitted his appeal.

30. Plaintiff has fully exhausted his administrative remedies for his request. Administrative remedies are deemed exhausted whenever an agency fails to comply with the applicable time limits, as stated by 5 U.S.C. § 552(a)(6)(C).
31. On January 4, 2013, Plaintiff filed the original complaint in this litigation. *See* Exhibit A.
32. During the pendency of this litigation, the FAA produced a few (but not all) responsive documents. One of these documents, submitted on February 5, 2013, is an email by FAA employee Jodi Baker, sent on June 30, 2010, but with the “to,” “cc,” and “bcc” fields empty. *See* Exhibit B.
33. Plaintiff is in possession of a version of that email that had been forwarded to him by Anne Bechdolt, his then-supervisor and the “to” recipient of that email. That version shows the recipients of the “to” and “cc” fields, but not the “bcc” field. *See* Exhibit C.
34. On February 9, 2013, Plaintiff contacted Ms. Kimball, the FAA’s counsel, saying, “I received the Jodi Baker email but the to, cc, and bcc fields were redacted, without any reason or type of exemption cited. So far that is the only redaction noted in any document I received from the FAA regarding this request. I would prefer not to have to supplement the complaint over it if possible.”
35. On February 12, Ms. Kimball replied, saying, “I spoke with the FAA regarding the Jodi Baker email and nothing was redacted – in the original form of the document, the to, cc, and bcc fields are blank.”
36. Plaintiff believes that the February 5, 2013 version of the June 30, 2010 email was derived from either Ms. Baker’s email account or the “bcc” recipient’s email account—presumably the only accounts that could signal the presence of a “bcc,” let alone its recipient(s).

37. Plaintiff asserts that either the February 5, 2013 version of the June 30, 2010 email was redacted or altered; an original, unaltered copy exists in an FAA system of records or database that is reasonably calculated to lead to responsive documents—such as backup tapes of Ms. Baker’s email account; or both.

38. Plaintiff now seeks to amend his complaint to assert that the February 5, 2013 document and the FAA’s February 12 response constitute an unjustified withholding under the FOIA, as well as a failure to identify the exemption used, in violation of 5 U.S.C § 552(b).

39. Plaintiff turns to this Court to enforce the remedies and public access to agency records guaranteed by FOIA.

### **CAUSES OF ACTION**

#### **I. Count 1: Violation of the Freedom of Information Act**

40. Plaintiff incorporates the allegations in paragraphs 1 through 39.

41. FAA’s failure to disclose the requested records in response to the July 27 request is a constructive denial and wrongful withholding of records in violation of FOIA, 5 U.S.C. § 552, and the Agency’s own regulations promulgated thereunder.

### **Relief Requested**

WHEREFORE, Plaintiff respectfully requests that this Court:

- i. Enter an Order declaring that FAA has wrongfully withheld the requested Agency records;
- ii. Issue a permanent injunction directing FAA to disclose to Plaintiff all wrongfully withheld records;

- iii. Order the FAA to submit affidavit(s) describing the search(es) conducted and Vaughn indices, as necessary and required by law;
- iv. Engage in *in camera* review of any exempt documents (or portions of documents) which exemptions or withholding are under dispute, as the Court deems proper;
- v. Maintain jurisdiction over this action until FAA is in compliance with FOIA, the Administrative Procedure Act, and every order of this Court;
- vi. Award Plaintiff his costs pursuant to 5 U.S.C. § 552(a)(4)(E); and
- vii. Grant such additional and further relief to which the Plaintiff may be entitled.

Dated: February 25, 2013

Respectfully submitted,



---

David Pardo  
*Pro se*  
4854 Eisenhower Avenue  
Unit 447  
Alexandria, VA  
(703) 829-7432  
dpardo@mspbwatch.net



**CERTIFICATE OF SERVICE**

I hereby certify that on this date, I sent a true and correct copy of the foregoing via electronic mail, pursuant to Fed. R. Civ. Proc. Rule 5(b)(2)(E), to:

KIMERE J. KIMBALL  
Special Assistant U.S. Attorney  
2100 Jamieson Avenue  
Alexandria, Virginia 22314  
Telephone: (703) 299-3770  
Fax: (703) 299-3983  
Email: Kimere.kimball@usdoj.gov

Dated: February 25, 2013

Respectfully submitted,



---

David Pardo  
*Pro se*  
4854 Eisenhower Avenue  
Unit 447  
Alexandria, VA  
(703) 829-7432  
[dpardo@mspbwatch.net](mailto:dpardo@mspbwatch.net)